INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and Rule involved	2
Statement	3
Argument	6
Conclusion	8

CITATIONS

Cases:

Acheson v. *Fujiko Furusho*, 212 F. 2d 284	7
Avina v. *Brownell*, 112 F. Supp. 15	6
Daley v. *Sears, Roebuck and Company*, 90 F. Supp. 562, affirmed, 182 F. 2d 347	7
Estevez v. *Nabers*, 219 F. 2d 321	8
Lentin v. *Commissioner of Internal Revenue*, 226 F. 2d 695, certiorari denied, 350 U.S. 934	7
Safeway Stores v. *Porter*, 154 F. 2d 656, certiorari denied, 328 U.S. 863	7
Sunshine Coal Company v. *Adkins*, 310 U.S. 381	6
Tait v. *Western Md. Ry. Company*, 289 U.S. 620	7

Statutes and Rule:

Immigration and Nationality Act of 1952, Section 360, 66 Stat. 273, 8 U.S.C. 1503(a)	2, 5, 6
Nationality Act of 1940, Section 503, 54 Stat. 1171, 8 U.S.C. (1946 ed.) 903	2, 4, 6
Rule 41 (b), Federal Rules of Civil Procedure	3, 7

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 657

MA CHUCK MOON AND MA CHUCK WOON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 78-81) is reported at 237 F. 2d 241. The memorandum opinion of the district court appears at record pages 44-62.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1956 (R. 82). A petition for rehearing was denied on November 15, 1956 (R. 83). The petition for a writ of certiorari was filed on December 28,

1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a judgment after trial, entered without qualifications as to prejudice, dismissing an action, brought pursuant to Section 503 of the Nationality Act of 1940, for a declaratory judgment to fix petitioners' status as American nationals barred, under the doctrine of res judicata, a subsequent action seeking precisely the same relief under present Section 360 of the Immigration and Nationality Act of 1952.

STATUTES AND RULE INVOLVED

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C. (1946 ed.) 903 read in pertinent part:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *

Section 360 of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U.S.C. 1503(a) reads in pertinent part:

> (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, * * *.

Rule 41(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

STATEMENT

Petitioners seeks reversal of the judgment of the Court of Appeals for the Ninth Circuit (R. 78-81), affirming the judgment of the District Court for the Western District of Washington which dismissed petitioners' suit to establish derivative American nationality on the ground that the issue had already been fully litigated and decided against petitioners in their previous declaratory judgment action.

In September 1952, Ma Tarn Sun, a citizen of the United States, claiming to be the father of the instant petitioners and Ma Chuck Wun, instituted in their be-

half an action for a declaratory judgment in the District Court for the Western District of Washington, to fix their status as American nationals pursuant to Section 503 of the Nationality Act of 1940, *supra* p. 2 (R. 34-35). The complaint first named Dean Acheson, Secretary of State, as defendant (R. 35). Thereafter, John Foster Dulles, his successor, was substituted as defendant (R. 35)

To afford a more complete presentation of the issue, the petitioners, and Ma Chuck Wun, were given travel documents and permitted entry into the United States under certificates of identity issued by the American Consulate at Hong Kong (R. 78). At a pretrial conference, the issues to be decided at the trial were limited to whether petitioners and Ma Chuck Wun were, as alleged, the blood sons of Ma Tarn Sun, and whether there was fraud in their claim that they were nationals of the United States (R. 35).

During the trial, petitioners committed perjury by denying that they had stated under oath before the American Consul at Hong Kong, that Ma Chuck Wun was not their blood brother (R. 37-38). Later in the trial, they admitted making these statements (R. 38).

After considering all the evidence adduced at the trial the district court dismissed the action, holding that petitioners had failed to sustain the burden of proving that they were sons of an American citizen, and that the evidence did not establish that Ma Chuck Wun was the blood son of Ma Tarn Sun (R. 34-39, 40-41, 51-54). No appeal was taken from this judgment (R. 32).

Subsequently, the petitioners, Ma Chuck Moon and Ma Chuck Woon, after a plea of guilty, were convicted of perjury and sentenced to the federal penitentiary at

McNeil Island, for terms of three and one-half and two and one-half years, respectively (R. 11).

On February 2, 1955, while incarcerated, the petitioners instituted the instant action again seeking a judicial declaration that they were the sons of Ma Tarn Sun (R. 3-5). This time the action was brought pursuant to Section 360 of the Immigration and Nationality Act of 1952, *supra* pp. 2-3. At first the complaint named only John Foster Dulles, Secretary of State of the United States, as defendant (R. 3). However, after the District Director of Immigration and Naturalization initiated deportation proceedings against petitioners, on May 12, 1955, on the ground that they were aliens convicted of perjury, a crime involving moral turpitude, (R. 17-21), petitioners were permitted to amend the complaint and add the District Director as a party defendant (R. 25-30). On October 24, 1955, the Attorney General of the United States was also added as a party defendant pursuant to petitioners' request (R. 42-44). No action was taken by the court regarding petitioners' further suggestion that the Secretary of State be dropped as a party. The court noted in its opinion, however, that petitioners' suggestion was made "under the apparent belief that the doctrine of res judicata would not be applicable where the parties are not the same" (R. 47).

The government moved to dismiss the complaint and for summary judgment (R. 5-6, 22, 30-31), on the ground that the prior judgment dismissing petitioners' suit for a declaratory judgment was dispositive of the instant action under the doctrine of res judicata (R. 7-8, 22-24, 31-41). Agreeing that res judicata barred the instant suit, the district court granted the govern-

ment's motion for summary judgment, and dismissed the action (R. 68-69). The Court of Appeals unanimously affirmed this judgment (R. 78-81).

ARGUMENT

Since the identical issue presented by the instant declaratory judgment action was fully litigated and resolved against petitioners in the earlier declaratory judgment suit, the courts below were correct in ruling that the prior adjudication barred the instant suit under the doctrine of res judicata.[1]

Petitioners argue that the doctrine of res judicata is inapplicable in that the parties in the two actions were not the same, the earlier action was dismissed without prejudice, and the question of deportation posed in this suit was not involved in the prior cause. All of these arguments are unsound.

1. Although the first action was instituted by Ma Tarn Sun, petitioners were there, as here, the real parties in interest. The difference in defendants resulting from the fact that, in the instant action, petitioners named as defendants the Attorney General of the United States and the District Director of Immigration and Naturalization, as well as the Secretary of State named in the former action, is of no real significance. "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government." *Sunshine Coal*

[1] Aside from differences immaterial to the instant case (cf. *Avina* v. *Brownell*, 112 F. Supp. 15 (S.D. Tex.)), the relief available under present Section 360 is precisely the same as that formerly available under Section 503 of the 1940 Act (see *supra* pp. 2-3).

Company v. *Adkins*, 310 U.S. 381, 402-403. See also, *Tait* v. *Western Md. Ry. Company*, 289 U.S. 620, 626-627; *Leulin* v. *Commissioner of Internal Revenue*, 226 F. 2d 695, 698 (C.A. 7), certiorari denied, 350 U.S. 934; *Safeway Stores* v. *Porter*, 154 F. 2d 656, 657 (E.C.A.), certiorari denied, 328 U.S. 863. A judicial declaration of nationality is not "a command to any head of any governmental department to do anything, or to refrain from doing anything, but fixes a status for the plaintiff which all persons inclusive of governmental authorities must respect * * *", *Acheson* v. *Fujiko Furusho*, 212 F. 2d 284, 296 (C.A. 9).

2. The prior judgment, after hearing, was dispositive of the merits and the dismissal was therefore with prejudice under Rule 41(b), F.R. Civ. P. Cf. *Daley* v. *Sears, Roebuck and Company*, 90 F. Supp. 562, 563 (N.D. Ohio), affirmed, 182 F. 2d 347 (C.A. 6).

Petitioners assert (Pet. 13-14) that since the *Furusho* case decided that rules relating to abatement are inapplicable to declaratory judgment suits to fix status as a United States national, it should follow that all rules of procedure, including Rule 41(b), are also inapplicable to such suits. This argument is specious. The court in *Furusho* merely pointed out that since the effectiveness of a Court decree declaring status as a United States national is not dependent upon any affirmative act by the defendant, it would be meaningless to apply to such an action the rules relating to abatement. See the Government's brief in opposition in *Mount Vernon Mortgage Corp. et al.* v. *United States, etc.*, No. 616, this Term, at pp. 9-10, 12-18.

3. There is no merit to the contention (Pet. App. B 29-30) that res judicata does not apply because the pro-

posed deportation of petitioners could not have been involved in, or properly decided, by the first judgment and petitioners should therefore be afforded an opportunity to defend against said deportation in the instant action. Petitioners do not challenge the deportation proceedings on any ground other than the claim that they are American nationals. As we have shown, that precise issue was decided in the previous suit. The proposed deportation poses no new dispute calling for relitigation. Cf. *Estevez* v. *Nabers*, 219 F. 2d 321, 323 (C.A. 5).[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1957.

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[2] There is no merit in the argument that the affidavit of Ma Tarn Sun to the effect that he is the father of the petitioner (R. 13-16), since it is uncontroverted, must be accepted as true. Because the action was dismissed as res judicata, there was no occasion to consider the merits.

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